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No. 95-1308

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

V-1 OIL COMPANY, INC. d/b/a V-1 PROFANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

PETER STIRBA
Counsel of Record
LINETTE B. HUTTON
STIRBA & HATHAWAY
Attorneys for Petitioner
215 South State, Suite 1150
Salt Lake City, Utah 84111
(801) 364-8300

8095
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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I

FURTHER REASONS FOR GRANTING THE WRIT

The arguments and analysis asserted in the government's Brief for the United States in Opposition erroneously focuses on V-1's activities in interpreting the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 1801 *et seq.* (1988 & Supp. V 1993) rather than the specific language of the Act itself as required under *Burger* and its progeny. This Court has stated that because an owner or operator of a closely regulated business has a reduced expectation of privacy, the traditional Fourth Amendment analysis has a lessened application. *New York v. Burger*, 482 U.S. 691, 702 (1987). However, any warrantless inspection of a closely regulated business will be deemed reasonable *only if* three criteria are met.

> First there must be a substantial governmental interest that informs the regulatory scheme, pursuant to which the inspection is made.
>
> * * *
>
> Second, the warrantless inspections must be necessary to further the regulatory scheme.
>
> * * *
>
> Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

Id. at 702, 703 (quotations omitted).

In regards to this third prong, this Court stated:

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be sufficiently comprehensive and defined that the owner of commercial property *cannot help but be aware* that his property will be subject to periodic inspections undertaken for specific purposes. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be carefully limited in time, place and scope.

Id. at 703 (emphasis added) (citations omitted).

In addressing the constitutional validity of the HMTA, it is the language of the statute itself which must warn an owner of commercial property "that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 703. When interpreting a statute, the reviewing court must first look to the plain meaning of the statute, and if the words are unambiguous, the inquiry ends. *Negonsott v. Samuels*, 507 U.S. 99, 104, (1993). Further, courts will give effect to the plain meaning of the language of a statute. *Schusterman v. United States*, 63 F.3d 986, 989 (10th Cir. 1995). As Justice Noonan, of the Ninth Circuit stated, "The dicta from *Marshall v. Barlows* are clearly qualified by the standard laid down in *Donovan* and *Burger*: there has to be a constitutionally adequate substitute for a warrant, and that substitute must be the statute being enforced." *United States v. V-1 Oil*, 63 F.3d 909, 914 (9th Cir. 1995) (citation omitted) (quotation omitted).

At issue is § 1808(c) of the HMTA that allows for the unannounced and warrantless inspections of a business. Specifically, the HMTA states:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> * * *
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.

49 U.S.C. App. § 1808(c) (1988).

"Person," "transportation" and "hazardous materials" have all been defined within the HMTA. A person, capable of transporting hazardous materials, is defined as:

> an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or agency or instrumentality of any government or Indian tribe when if offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise.

49 U.S.C. § 1802(11) (1988 & Supp. V 1993). Transportation is

defined as "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 U.S.C. § 1802(15) (1988 & Supp. V 1993).

Ninth Circuit Justice Noonan observed that the HMTA defines as hazardous over 2,000 materials. *United States v. V-1 Oil*, 63 F.3d at 913. In addition to the poisonous, flammable and corrosive items listed, many of the items such as, batteries, dry ice, matches, extracts or electric wheelchairs, not normally thought of as hazardous, are included in the hazardous materials list. 49 C.F.R. § 172.101. According to the plain language of the statute then, anyone who transports hazardous materials, regardless of whether it is vanilla extract or propane, is subject to warrantless inspections. Justice Noonan noted this problem when he stated:

> [t]he businesses involved in manufacturing, fabricating, marking, maintaining, reconditioning, repairing, and testing of packages or containers for use in the transportation of such materials must be legion. The list of the materials is so long and so many businesses must be involved in the transportation of the materials in commerce that no business within the enumerated categories could be sure if it would ever be visited by inspectors.

United States v. V-1 Oil, 63 F.3d at 913, 914.

It is this broad, all-encompassing language that fails to adequately notify the owner of a business that his property and records will be subject to periodic inspections. Both the Ninth Circuit and the government, however, erroneously assert that there is some type of language in the statute that meets this third prong of *Burger*. However, neither the Ninth Circuit nor the

government in its Brief in Opposition has offered an analysis within the framework provided by this Court that shows how the FRA "statute" [is] sufficiently comprehensive that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Rather, the government states that V-1's own activities provide adequate notice that it may be subject to periodic inspections rather than focusing on the language of the statute. This is a complete misapprehension of the criterion set forth by this Court and overlooks completely the Fourth Amendment standard of reasonableness for a government search "even in the context of a pervasively regulated business." *Burger*, 482 U.S. at 702. *See also United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73, n. 1, 2. (1970); *Donovan*, 452 U.S. at 596.

Using the government's logic, and applying the broad language of the HMTA, owners of a "mom and pop" business who receive and unload their inventory of matches and batteries from a supplier and then either offer them for sale or move them from one store to another will be subject to inspection. There is no limit as to who or what may be inspected, so long as that person or entity transports or ships hazardous materials in commerce. The mere fact that V-1 unloads and stores propane should not be determinative of the constitutional validity of the HMTA.

In applying the three criteria set forth in *Burger*, this Court focused strictly on the specific statute which purported to authorize warrantless searches. The same analysis must take place in this case. In *Burger*, the Court found that the language of the challenged statute itself was sufficient to give business operators notice that they would be subject to inspections. *Burger*, 482 U.S. at 703. Specifically, New York's warrantless

inspection statute of junkyards stated that the search of records applied only to "vehicles or parts of vehicles for which a certificate of title has been issued . . ." *Id.* at 693, n. 1. The statute further stated, "Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition . . ." *Id.* The statute also stated that inspections will take place during the agent's or officer's "regular and usual business hours." *Id.* Finally, in examining the language of the statute, it was determined that inspections could only be made of vehicle-dismantling and related industries and that inspectors could only examine the records as well as any vehicles or parts of vehicles that were subject to the record keeping requirements of the statute. *Id.* at 712.

Upon examining the language of § 1808(c), it becomes clear that such specificity, as was found in *Burger*, is lacking. Where specific records that could be inspected were listed in *Burger*, there is only a general description of "records" in the HMTA. 49 U.S.C. App. § 1808(c) (1988). Where the time for an inspection was listed, "during regular and usual business hours," there is only the general description of "reasonable times." *Burger*, 482 U.S. at 694, 49 U.S.C. App. § 1808(c). Finally, where there was a specific statement of what could be inspected, in addition to the records, namely any vehicles or vehicle parts subject to the record keeping, the HMTA makes a general statement that "records and properties" may be inspected. *Burger*, 482 U.S. at 694, 49 U.S.C. App. § 1808(c) (1988).

Each statute this Court has examined and found Constitutionally valid has been similarly specific in describing what was to be searched and when. In *Biswell*, the statute in question authorized official entry into the premises, including storerooms, during "business hours" of any "firearms or

ammunition dealer" for the purpose of examining the records kept in relation to the business as well as any firearms or ammunition kept or stored. *Biswell*, 406 U.S. at 311, 312. In light of the specificity of the statute, this Court stated that "[t]he dealer is not left to wonder about the purposes of the inspector or the limits of his task." *Id.* at 316.

In *Colonnade*, the inspection statutes allowed for inspection during "business hours" of any "retail liquor dealer" for the purposes of inspecting records pertaining to the sale of "distilled spirits, wines, or beer" and to examine such objects or articles. *Colonnade*, 397 U.S. at 73, n. 1, 2.

In *Donovan*, federal mine inspectors were required to inspect "underground mines at least four times a year and surface mines at least twice a year" to ensure compliance with health and safety standards. If any violations were discovered, follow-up inspections were authorized. *Donovan*, 452 U.S. at 596. In light of the specificity of the statutory language, as well as the certainty and regularity of its application, this Court determined that the statutes in question were a constitutionally adequate substitute for a warrant. *Id.* at 603. In view of this Court's analysis, it is clear that the HMTA fails the third prong in the *Burger* test. There is no certainty or regularity in its application. *Burger* 482 U.S. at 702. *See also United States v. Kaiyo Maru No. 53*, 669 F.2d 989, 996 (9th Cir. 1983) (Inspections conducted once every three weeks were sufficient to notify owners of vessels that they would be searched.)

For fifteen years, no attempt was made to inspect V-1 facilities. However, this is only one element to be considered in determining whether there is any certainty or regularity in the application of the HMTA. The Court must also look to see whether there are adequate limits placed on the inspectors. *Burger*, 482 U.S. at 703. As discussed *supra*, statutes that passed

a Fourth Amendment analysis contained language as to when inspections could be held, (during regular business hours, *id.* at 694; during business hours, *Biswell*, 406 U.S. at 311; *Colonnade*, 397 U.S. at 72; at least four times a year for underground mines and at least twice a year for surface mines, *Donovan*, 452 U.S. at 594.) There is no such limitation in the language of the HMTA. It simply mandates that inspections be conducted at reasonable times. 49 U.S.C. App. § 1808(c) (1988). It is not until one examines the FRA's enforcement manual to see what "reasonable times" means. An FRA inspector may conduct an inspection at any time during his own normally assigned hours, regardless of whether or not those are the same hours a business might operate. If the inspector decides to conduct an inspection outside his normal hours, he need only contact his supervisor first. (App. H, 58a). In addition, these guidelines are subject to change at the FRA's discretion and without warning to V-1 or any other entity ostensibly subject to the HMTA.

The Ninth Circuit attempted to downplay this fact when it discussed the FRA manual. To give the illusion that the HMTA states that inspections may only take place during regular business hours, the Ninth Circuit cited to *Burger* and its language that limited New York inspectors to conducting inspections only during the regular and usual business hours. *United States v. V-1 Oil*, 63 F.3d at 912, 913. However, upon examining the language of § 1808(c), it is clear that this language is missing. 49 U.S.C. § 1808(c) (1988).

The government further attempts to mislead this Court by mischaracterizing V-1's inspection deficiencies. Respondent's Brief at 10. V-1 does not dispute the fact that there were deficiencies. However, the government attempts to categorize these deficiencies as extreme safety violations or violations that can be quickly corrected. Respondent's Brief at 10. The only deficiencies noted in the FRA's inspections of V-1, dealt with the

wrong form being used, a form that is issued by the railroad, incorrect wording on the form, the size of the lettering on placards and other minor, non-safety related errors. (App. I, 59a-61a). Also, V-1 never refused to allow an inspection of its facilities. Respondent's Brief at 5. It did request that FRA inspectors complete a questionnaire, designed to ascertain the inspector's qualifications. Rather than complete the questionnaire and pursue the inspection, the inspectors left the premises. It is these types of examples of how the government is attempting to mislead this Court.

In each of the cases that went into the formulation of the criteria set forth in *Burger*, namely *Colonnade Corp. v. United States*; *United States v. Biswell*; *Donovan v. Dewey*, as well as others cited by the Court, were all premised on warrantless inspection statutes that provided enough specificity that each business involved was placed on notice that they would be subject to inspection. The way § 1808(c) currently reads, the requirement that the "statute must be sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections" is wholly lacking. *Burger*, 482 at 703. If this language is allowed to remain in force and agencies such as the FRA are allowed to continue to conduct unannounced and warrantless inspections under the auspices of its validity, the whole premise and principle of this Court's holding in *Burger* will be destroyed.

CONCLUSION

For this reason, as well as those cited in Petitioner's Brief, the writ should be granted.

Respectfully submitted,

PETER STIRBA
Counsel of Record
LINETTE B. HUTTON
STIRBA & HATHAWAY
Attorneys for Petitioner
215 South State Street, Suite 1150
Salt Lake City, Utah 84111
(801) 364-8300